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No. 621

In the Supreme Court of the United States

OCTOBER TERM, 1957

WELDON BRUCE DAYTON, PETITIONER

v.

JOHN FOSTER DULLES, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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MEMORANDUM FOR THE RESPONDENT

Petitioner seeks review of a decision of the Court of Appeals for the District of Columbia Circuit upholding the denial by the Secretary of State of petitioner's application for a passport. The court below, stating that "the case falls into two parts", addressed itself first to the question of whether the Secretary of State could validly refuse to issue petitioner a passport on the basis of a determination that petitioner was going abroad knowingly and wilfully to advance the Communist movement, and held that "[t]hat question was answered fully in *Briehl*. We there held he could refuse upon that ground." (Pet.

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App. C, p. 5.) The court also ruled in favor of the Secretary in answering the second question—"whether the Secretary could base his conclusion in this matter partly upon confidential information" (*id.* at 5–11).

We agree that the initial questions presented in this case, to the extent that they concern the basic authority of the Secretary of State to restrict the travel of citizens by refusing to issue passports on the grounds set forth in Section 51.135 of the Passport Regulations (22 C. F. R., 1956 Supp., 51.135), are essentially the same as some of the issues presented in *Kent and Briehl* v. *Dulles*, No. 481, this Term. We did not oppose the petition for certiorari in that case, and on November 25, 1957, this Court granted certiorari. In these circumstances, the respondent does not oppose the granting of the writ of certiorari in the present case.

It may be that, with regard to this initial aspect of the present case, the Court will be inclined to withhold action upon the petition until it disposes of *Kent and Briehl*. It is therefore appropriate to summarize briefly our views on the second aspect of the case—which presents a question not raised in *Kent and Briehl*. As the court below pointed out in connection with this second issue, "[t]he Supreme Court has not passed upon the precise question here before us, *i. e.*, the permissible reliance upon confidential information in a passport case" (Pet. App. C, pp. 5–6). In our view, the issue is also an important one and is appropriate for authoritative disposition by the Court in this case. We therefore do not oppose the grant-

ing of the writ of certiorari to consider this aspect of the case, as well as the aspect related to *Kent and Briehl*. At the same time, we express our belief that the ruling below, based upon "helpful guideposts in the principles laid down by the [Supreme] Court in different fields" (*id.* at 6), is correct. Moreover, we do not agree that the decision is in conflict with that of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708, as petitioner asserts (Pet. 11, 14–15). While that case likewise concerned the validity of the use of confidential information in an administrative proceeding—as judged by the standards of due process—the subject matter, the governing statute, the regulations under which the administrative proceedings were conducted, and the manner in which the regulations were applied, all varied greatly from the present case. Since such variations in particular circumstances are of the very essence in determining whether the requirements of due process have been met, it cannot be said that the ruling of the court below on the propriety of the use of confidential information in this particular passport case is in conflict with that of the Ninth Circuit in the different cases arising under the Port Security Program of the Coast Guard.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1957.

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